ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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March 23, 2004

The Honorable John Ashcroft
Attorney General
U.S. Department of Justice
Washington, DC 20530

Dear Mr. Attorney General:

I understand that a recent Supreme Court decision has placed the federal government at a disadvantage by depriving the government of well-established, long-standing legal privileges available to all other, non-governmental litigants. The Supreme Court's 2001 decision in *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, seems to have tipped the balance of justice by requiring the government to publicly disclose, under the Freedom of Information Act (FOIA), documents regarding settlement negotiations and communications with co-parties while non-governmental litigants are not obliged to reveal such information.

Prior to the *Klamath* decision, it is my impression that the Department of Justice generally relied on FOIA Exemption 5, 5 U.S.C. § 552(b)(5), to withhold federal records of sensitive communications with co-parties and settlement negotiations with opponents, but then *Klamath* largely undermined that reliance and vitiated the protections that otherwise apply to these records. As a result, has the Department of Justice been compelled to publicly disclose documents regarding settlement negotiations or communications with co-parties? If so, it appears that *Klamath* has provided a FOIA "end run" around the protections that courts generally provide for such exchanges.

I am concerned that such disclosures place the government at a disadvantage vis-a-vis non-governmental parties and prejudice taxpayer interests because they reveal information about the government's negotiating position and vulnerabilities in litigation, which then can be used to unfair advantage by other litigants. Consequently, I am considering whether to pursue legislation to address this matter. To assist in this evaluation, I request that you address the following questions:

(1) What precisely is your understanding of the *Klamath* holding?

(2) How does *Klamath* affect the Federal Government's litigation with respect to settlement exchanges and exchanges with co-parties?

(3) What types of cases are affected? Please give examples.

(4) What is the best solution for restoring to the government the same legal protections non-governmental litigants enjoy?

(5) What effect would a legislative solution to the problem have on government openness and accountability?

Thank you in advance for your prompt attention to this matter.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

August 31, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter of March 23, 2004, seeking information related to the impact of the Supreme Court decision in *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), on the handling of litigation by the Department of Justice. The letter asks how *Klamath* has affected our ability to maintain confidentiality for our exchanges with aligned parties ("common interest" exchanges) and our settlement exchanges with opposing parties. *Klamath* has adversely affected expectations of confidentiality for common interest and settlement exchanges in the full range of civil and criminal litigation conducted by the Government. We provide the responses below to your specific questions.

The Department of Justice strongly supports legislation to ensure that its common interest and settlement exchanges in litigation remain protected from disclosure, commensurate with existing legal privileges and court protections. Any legislation must not affect the disclosure of final settlements under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

1. What precisely is your understanding of the *Klamath* holding?

In *Klamath*, the Supreme Court addressed the scope of FOIA's exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). In particular, the Court addressed the threshold part of exemption 5, which applies to records that are "inter-agency or intra-agency memorandums or letters." The Court found it unnecessary to reach the remainder of exemption 5, which incorporates legal privileges such as attorney work product and other court protections.

The Court ruled that communications between the Department of the Interior ("DOI") and several Indian tribes which, as applicants for a water allocation by DOI, were "seeking a Government benefit at the expense of other applicants," did not meet the threshold of exemption 5 of FOIA because the communications were not "inter-agency or intra-agency" documents.

As will be discussed below, litigants have been arguing that the effect of *Klamath* goes beyond the narrow facts involved in that case. Relying on *Klamath*'s discussion of what is an "inter-agency or intra-agency" document under exemption 5, opposing parties have begun to seek the Government's exchanges with co-parties and settlement exchanges with opposing parties through FOIA requests and related litigation. As a result, the Department of Justice in some cases has been obliged to publicly disclose documents that ordinarily would be protected under legal privileges and other court protections.

2. How does *Klamath* affect the Federal Government's litigation with respect to settlement exchanges and exchanges with co-parties?

Historically, the Justice Department has asserted FOIA exemption 5 to protect its exchanges with co-parties (common-interest exchanges) and settlement exchanges with opposing parties. The Department argued consistently, though usually not successfully, that exemption 5 was co-extensive with legal privileges and other court protections for these exchanges.

Legal privileges and other court protections generally allow litigants to communicate with aligned parties and make settlement exchanges with opposing parties in confidence. These protections promote the settlement process, which generally is regarded as a more efficient means of resolving such disputes than litigation. *See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003) (recognizing settlement privilege). These protections also allow aligned parties to cooperate in litigation. *See, e.g., U.S. v. American Telephone & Telegraph Co.*, 642 F.2d 1285, 1300 (D.C. Cir. 1980) (applying the common interest privilege to exchanges between the Justice Department and a private plaintiff in parallel antitrust enforcement cases, and declaring that the "[g]overnment has the same entitlement as any other party to assistance from those sharing common interests").

The fact that the court in *Klamath* did not distinguish between the specific communications in question in that case from common interest exchanges and settlement exchanges has converted FOIA into a "discovery loophole" that parties are using increasingly against the Government to circumvent legal privileges and other court protections. *Klamath* has disadvantaged the Government unfairly by forcing it to disclose privileged common interest exchanges with co-parties and settlement exchanges with opposing parties. The Government is receiving an increasing number of requests for these documents. The risk of forced disclosure is deterring the sharing of information and other documents that would otherwise be confidential between parties in litigation and thereby hindering effective communication between co-parties and the efficient settlement of cases.

3. What types of cases are affected? Please give examples.

Klamath has adversely affected expectations of confidentiality for exchanges with parties with whom we are aligned in litigation. These "common interest" exchanges occur in cases spanning the full range of civil and criminal litigation conducted by the Government. They often include cases in which we share common interests with foreign, State, local or tribal governments. For example:

- CRIMINAL DIVISION, UNITED STATES ATTORNEYS' OFFICES/Exchanges with Foreign, State and Local Law Enforcement Agencies - Pursuant to treaties with foreign governments, our Criminal Division routinely seeks assistance from foreign governments or their law enforcement agencies (typically on behalf of United States Attorneys' Offices) in furtherance of pending law enforcement investigations in the United States, including terrorism cases. In the course of such exchanges, Federal prosecutors necessarily divulge information to the foreign agency that otherwise would be considered attorney work product. *Klamath* has called into question whether this disclosure, even where limited to a foreign law enforcement agency for the specific purpose of a criminal prosecution, would render the information so divulged subject to disclosure once the proceeding no longer was open. The realization that such attorney work product, typically reflecting tactical and strategic judgments by Justice Department prosecutors, ultimately may be subject to compelled disclosure under FOIA would have a chilling effect on prosecutors' ability to communicate effectively with their foreign law enforcement counterparts. We have the same concerns about our less formal communications with State and local law enforcement agencies within the United States.

- ANTITRUST DIVISION - The Justice Department often brings antitrust enforcement actions jointly with States. During the course of these joint enforcement actions and in the investigations leading up to them, sensitive law enforcement information is shared extensively. In addition, the Justice Department obtains much useful information for its enforcement actions from private parties who either are pursuing their own parallel court actions or are in a position to do so. Disclosure of these exchanges, even from closed cases, would materially impair the Department's ability to pursue enforcement actions jointly with State antitrust enforcers, as well as risk the loss of important sources of investigatory information.

- ENVIRONMENT AND NATURAL RESOURCES DIVISION/Cases for Benefit of Tribes - The Justice Department routinely brings cases to carry out the Federal government's fiduciary duty to act for the benefit of tribes. Before *Klamath*, the Department would share documents with tribes under the common interest privilege. Since *Klamath*, we have been forced to disclose common interest exchanges in some cases and, as a result, we have been greatly hampered in our ability to litigate effectively for the benefit of tribes.

- CIVIL RIGHTS DIVISION/East Baton Rouge Parish, Louisiana Case - This school desegregation case was brought by two private plaintiffs and the United States as plaintiff-intervener. The plaintiffs exchanged draft settlement proposals among themselves. Forced release of these draft proposals would hinder our cooperation with the private co-plaintiffs in this case. It also would set an adverse precedent for future cases, making it harder to bring, prosecute, and settle these cases. It likely would lead to fewer cases being settled and a commensurate increase in protracted litigation.

Klamath also has adversely affected expectations of confidentiality for settlement exchanges in the full range of civil and criminal litigation conducted by the Government. For example:

- CIVIL RIGHTS DIVISION/Police Brutality Cases - The Justice Department commonly resolves police brutality cases by entering into negotiated consent decrees with the involved cities and police departments. In the settlement process we routinely exchange settlement drafts with local officials. Historically, we have expected settlement exchanges to remain confidential and not subject to disclosure. However, recent attempts to obtain these drafts have raised concerns about our ability to maintain confidentiality. As a result, we now are cutting down on written settlement exchanges, meaning that more issues have to be resolved orally. This greatly complicates the settlement process and makes it far more difficult to settle a case.

- ANTITRUST DIVISION - During settlement negotiations in a civil antitrust enforcement action, the Justice Department typically exchanges extensive information with the firm or firms against whom it has brought the action, including drafts of settlement proposals. Disclosure of these exchanges not only could interfere materially with settlement of the enforcement action, but also could have a profoundly chilling effect on the kind of frank discussions and information exchanges that are essential to effective negotiations in antitrust enforcement actions.

- ENVIRONMENT AND NATURAL RESOURCES DIVISION/Environmental Enforcement Cases - The magistrate judge in a pending Superfund case issued a confidentiality order to block discovery of settlement exchanges between the Government and private parties as well as among the private parties. The order specifically blocked discovery requests filed by the lone non-settling party in the case. To circumvent the order, the lone non-settler then filed a FOIA request with the Justice Department. The Department was forced to go back to court to seek clarification that the order was meant to block disclosure under FOIA as well. The magistrate judge issued a clarifying order. The non-settler is now challenging the clarification.

Protecting settlement and common interest exchanges would simply return the Government to the same footing as other litigants. Litigants have long had a reasonable expectation of confidentiality for their common interest and settlement exchanges. Congress need not overturn *Klamath*. However, we strongly support legislation restoring and clarifying the legal protections that were the basis for the Government's expectation of confidentiality for settlement and common interest exchanges prior to *Klamath*, similar to that which would normally be accorded to other parties in litigation. Although the Government may ultimately be able to prevail in some of the controversies that this letter describes, the uncertainty of *Klamath* will create burdensome litigation and chill candid exchanges of views.

4. What is the best solution for restoring to the government the same legal protections non-governmental litigants enjoy?

We recommend that Congress adopt confidentiality legislation to address this problem. Since FOIA's exemption 3 incorporates confidentiality provisions contained in other Federal statutes, *see* 5 U.S.C. § 552(b)(3), FOIA itself need not be amended.

5. What effect would a legislative solution to the problem have on government openness and accountability?

We believe that a legislative solution to the problems identified above would not affect government openness and accountability. Rather, it would remedy a new, unintended consequence arising under FOIA. In passing FOIA, Congress itself recognized the importance not only of making available to the public information that ought to be available, but also of protecting certain information that, if disclosed, would impair legitimate governmental functions:

> At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary . . . for the very operation of our Government to allow it to keep confidential certain information. . . .
>
> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests. . .

S. Rep. No. 813 at page 3. A legislative solution would return a reasonable balance of these interests and restore the Government's ability to operate effectively.

Justice Brennan has discussed the Government's need to maintain confidentiality in its strategy for handling and settling litigation. Otherwise, for example, a future opponent could unfairly disadvantage the Government by learning its litigation and settlement strategies from similar past cases:

> It would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency in connection with earlier, similar litigation against other persons. He would get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate 'on wits borrowed from the adversary.' Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled.

FTC v. Grolier, Inc., 462 U.S. 19, 31 (1983) (Brennan, J., concurring) (citations omitted).

Further, Congress has long recognized the legitimate interest of taxpayers and their Federal government in the efficient settlement of lawsuits. To be effective, these processes routinely involve the confidential exchange of documents. Indeed, the Justice Department depends on the settlement process to resolve many cases every year and avoid lengthy trials, saving taxpayer dollars as well as the time and resources of the Executive and Judicial branches of Government. A requirement to disclose what normally would be confidential communication between parties inevitably would chill the willingness of opposing parties to share settlement documents, thereby interfering with the Government's ability to negotiate and settle cases in the interest of the United States.

The Justice Department strongly supports legislation to reestablish a level playing field in litigation by employing FOIA exemption 3 for the Government's common interest exchanges with aligned parties and settlement exchanges with opposing parties. The legislation must not affect the disclosure of final settlements under FOIA.

Thank you for the opportunity to express our views. Please do not hesitate to contact us if we can be of further assistance on this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary